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In The

Supreme Court of the United States

COMMISSIONER OF PUBLIC LANDS
FOR THE STATE OF NEW MEXICO,

Petitioner,

v.

STATE OF NEW MEXICO *ex rel.*
STATE ENGINEER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of New Mexico

PETITION FOR A WRIT OF CERTIORARI

ROBERT A. STRANAHAN, IV
General Counsel
STEPHEN G. HUGHES
JOHN L. SULLIVAN
NEW MEXICO STATE
LAND OFFICE
P.O. Box 1148
Santa Fe, New Mexico
87504-1148
(505) 827-5713

TANYA L. SCOTT
Counsel of Record
LAW & RESOURCE PLANNING
ASSOC. P.C.
201 Third Street NW,
Suite 1750
Albuquerque, New Mexico
87102-3353
(505) 346-0998

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the New Mexico Commissioner of Public Lands may claim federal reserved water rights with respect to lands Congress reserved from the federal public domain, and granted to the State of New Mexico subject to a strict, federally enforceable trust, to support public education and for other related purposes specified by Congress.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals of the State of New Mexico were:

State of New Mexico *ex rel.* State Engineer (Plaintiff-Appellee);

Commissioner of Public Lands for the State of New Mexico (Defendant-Appellant); and

United States of America; Jicarilla Apache Nation; Navajo Nation; Ute Mountain Ute Tribe; San Juan Water Commission; and BHP Navajo Coal Company (Defendants-Intervenors-Appellees).

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PETITION FOR A WRIT OF CERTIORARI

The Commissioner of Public Lands for the State of New Mexico (hereinafter, the "Commissioner") petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals of the State of New Mexico.

OPINION BELOW

The decision of the Court of Appeals of the State of New Mexico (App. 1a-32a) has not yet been published in the New Mexico Reports or the Pacific 3d Reports. The vendor neutral citation for the Opinion is 2009-NMCA-004.

JURISDICTION

The New Mexico Court of Appeals issued its Opinion on September 24, 2008. App. 1a. On November 20, 2008, the Supreme Court of the State of New Mexico entered an Order denying the Commissioner's Petition for Writ of Certiorari to the New Mexico Court of Appeals. App. 47a-48a. This Court has jurisdiction to review the decision of the New Mexico Court of Appeals under 28 U.S.C. § 1257, which authorizes review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed

under the Constitution or the treaties or statutes of . . . the United States."

This case involves the Commissioner's claim to certain federal law water rights on the lands withdrawn from the federal public domain and granted in trust by the United States to the State of New Mexico to support public schools and for other related purposes (sometimes referred to herein as the "trust lands"). The Commissioner raised this claim as part of a state court adjudication of all water rights in the San Juan-Animas-La Plata River basin in northwestern New Mexico. The State Engineer of the State of New Mexico commenced the general water rights adjudication by filing a complaint in the Eleventh Judicial District Court, San Juan County, and later opened a subfile proceeding seeking a determination that the Commissioner may not claim any water rights arising under federal law. In response to a District Court order directing the parties to file briefs regarding the merits of Commissioner's federal law claims, the Commissioner filed a motion for general declaratory relief, and the State Engineer filed a motion for summary judgment against the Commissioner. The District Court entered an Order and Final Judgment in favor of the State Engineer against the Commissioner. App. 42a-46a.

The New Mexico Court of Appeals decision affirming the District Court judgment constitutes a final judgment or decree by the highest court of the State of New Mexico in which a decision could be had. In its Order and Final Judgment, the District Court

stated that the judgment was an appealable judgment pursuant to Rule 1-054(B)(1) of the New Mexico Rules of Civil Procedure. App. 45a. *See also State ex rel. State Engineer v. Parker Townsend Ranch Co.*, 118 N.M. 780, 781, 887 P.2d 1247, 1248 (1994) (holding that general adjudication subfile order adjudicating water rights as between the State and water rights claimant is a final and appealable judgment). Upon denial of certiorari by the New Mexico Supreme Court, the state court judgment became final for purposes of this Court's jurisdiction. *See United States v. New Mexico*, 438 U.S. 696 (1978) (reviewing New Mexico Supreme Court decision affirming a general stream adjudication judgment denying federal reserved rights claim asserted by the United States).

At issue is the Commissioner's assertion of water rights arising under federal law, specifically the "implied-reservation-of-water doctrine," *United States v. New Mexico*, 438 U.S. at 700, more commonly referred to as the "federal reserved water rights doctrine." *See generally Cappaert v. United States*, 426 U.S. 128 (1976); *Arizona v. California*, 373 U.S. 546 (1963); *Winters v. United States*, 207 U.S. 564 (1908). The federal reserved water rights doctrine derives from two sources of authority in the United States Constitution: the Commerce Clause of Article I, § 8, which permits federal regulation of navigable streams, and the Property Clause of Article IV, § 3, which permits federal regulation of federal lands. *Cappaert v. United States*, 426 U.S. at 138. Further,

the Commissioner's claim is based on federal statutes reserving the trust lands, and granting them to the State of New Mexico, as trustee, in a federally created and enforceable trust. As set forth in the Congressional acts reserving the lands and granting them to the State, the trust's express purpose is to provide a perpetual resource (lands and their revenues) to support civil infrastructure, primarily public education. The Commissioner claims that these Congressional actions implicitly included a reservation of an appurtenant right to use water needed to achieve Congress' purpose.

The New Mexico Court of Appeals based its decision on its interpretation of the federal reserved water rights doctrine as applied to the trust lands. App. 15a-31a. The Court acknowledged that the federal reserved rights doctrine represents an exception to the general rule that state law governs water rights. App. 16a (citing *United States v. New Mexico*, 438 U.S. at 702). The Court of Appeals said that the federal reserved water rights doctrine should be narrowly construed because of its potential effect on the administration of water rights arising under state law and the state law doctrine of prior appropriation.[1]

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[1] *See* N.M. Const., art. XVI, § 2 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.") and § 3 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water.").

App. 16a-19a. Nonetheless it is clear that the Commissioner's claimed title, right, or privilege arises under and is governed by federal law, and that the Court of Appeals decision does not rest on any adequate and independent state law grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (adequacy and independence of any possible state law ground must be clear from the face of the opinion).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in the appendix to this petition:

(i) New Mexico Organic Act of 1850, ch. 49, § 15, 9 Stat. 446 (1850);

(ii) Ferguson Act of 1898, ch. 489, §§ 1-4, 6-7, and 10, 30 Stat. 484 (1898);

(iii) New Mexico-Arizona Enabling Act of 1910, ch. 310, §§ 6, 7, 10 and 12, 36 Stat. 557 (1910);

(iv) School Lands Act of 1927 (Jones Act), ch. 57, 44 Stat. 1026 (1927), 43 U.S.C. §§ 870-871 (as amended).

STATEMENT

This case arises in the context of the long-standing federal policy of reserving lands from the

public domain to support public education. Following the American Revolution, Congress established a system for the orderly settlement of the new western lands obtained under the Treaty of Paris. *See* General Land Ordinance of 1785, reprinted in 2 *The Territorial Papers of the United States: Territory Northwest of the River Ohio, 1787-1803* at 12-18 (1934); Northwest Ordinance of 1787, reprinted in 1 Stat. 50 (1787). To ensure orderly development, the General Land Ordinance of 1785 required that the new lands be surveyed prior to settlement; and to promote good government, it required that section 16 in each township be reserved to support public education, thus providing for the educated electorate deemed essential to democracy. Sally K. Fairfax, Jon A. Souder & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 Envtl. L. 797, 803-06 (1992). A similar principle was incorporated into the Northwest Ordinance of 1787, which, in charting the settlement of the Western territories and their admission as states, declared that "Religion, Morality, and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall be forever encouraged." *Id.* at Article 3.

Increasing requirements for the establishment of civil and political institutions was intended to guarantee the passage from territorial status to admission into the Union on an "equal footing" with the more settled and developed Eastern states. Sally K. Fairfax & John A. Souder, *State Trust Lands* 19-26 (1996);

Sean O'Day, *School Trust Lands: The Land Manager's Dilemma Between Educational Funding And Environmental Conservation, A Hobson's Choice?* 8 N.Y.U. Envt. L. J. 163, 176 (1999) (land grant plan "was fueled by both a desire to place all states on an equal footing and a vision that those states would be settled by an enlightened people"). Over the course of the next 125 years, Congress generally followed the framework established in the Northwest Ordinance, which included consistently reserving and dedicating land from the public domain for the support of public education in 31 of the 35 states that entered the Union. *United States v. Wyoming*, 331 U.S. 440, 443 (1947); *Papasan v. Allain*, 478 U.S. 265, 268-70 (1986). The need to set aside resources for support of civil infrastructure became increasingly important as Manifest Destiny impelled a westward expansion into the arid and unpopulated western lands. Accordingly, more lands were set aside over time to ensure that sufficient resources would be made available to the citizens of newly admitted states. *See Lassen v. Arizona ex rel. Arizona Highway Dept.*, 385 U.S. 458, 460-63 (1967). This case presents the next chapter in enforcement of the federal policy to ensure that sparsely populated areas of the Western United States, as a condition of being admitted into the Union, would conserve and use the natural resources made available to them for the purposes intended by Congress – development of school systems and public infrastructure that would make them self-sustaining and not dependent upon the federal treasury.

The material facts concerning the Commissioner's reserved rights claim largely consist of the Congressional acts reserving the trust lands from the federal public domain and granting them in a federally enforceable trust, as well as the historical context in which each of those acts occurred. Although the grant in trust to the state necessarily conceded the sovereignty of the new state, the federally created trust imprinted upon those lands the historic federal purpose through the imposition of fiduciary duties, strict standards of management, and federal enforcement. The express trust permitted sufficient ongoing federal control over the granted lands to guarantee that they would serve, in perpetuity, Congress' purpose. In addition, the state court record includes extensive historical evidence of Congressional awareness that the arid lands of New Mexico required irrigation in order to provide value as a resource.

1. *New Mexico Organic Act of 1850 (Act of Congress dated Sept. 9, 1850), ch. 49, 9 Stat. 446 (1850).* In Section 15 of the New Mexico Organic Act, Congress provided that:

> When the lands in said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory *shall be, and the same are hereby, reserved for the purpose of being applied to schools* in said territory, and

> in the states and territories hereafter to be erected out of the same.

(Emphasis added.) *See also* Revised Statutes of 1873 § 1946 (reaffirming school lands reservation in New Mexico, Arizona[2] and six other territories).

The Act clearly expressed a present intention to reserve the lands which "shall be and the same are hereby, reserved . . . " Since the General Land Ordinance had required that lands be surveyed before settlement, such a reservation was sufficient to assure the dedication of the lands to the stated purpose without interference. But soon after the New Mexico Organic Act, the government embarked on a new federal land disposal policy, first fully articulated in the Homestead Act of 1862, which encouraged more rapid settlement by permitting "homesteading" prior to survey. Although the overall federal purpose of promoting the orderly settlement, governance, and equal footing of Western states remained the same, the development of the lands and the education of the populace now appeared to conflict: lands reserved for education might be settled before they were identified by survey. Congress moved to harmonize these two policies by confirming the reservation of school lands, and by providing for lands equivalent to those which might be lost to early settlement.

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[2] The Territory of Arizona was carved out of the New Mexico Territory in 1863. Act of Feb. 24, 1863, ch. 56, 12 Stat. 664 (1863).

Under the Act of February 26, 1859, ch. 58, 11 Stat. 385 (1859) (Rev. Stats. § 2275), the reservation for school purposes did not apply where the school land had been settled for purposes of preemption prior to the survey. Otherwise, as the public land survey of each township was completed, title remained in the United States, but the reserved sections 16 and 36 were withdrawn from the federal public domain and were no longer subject to public entry. *Dugan v. Montoya*, 24 N.M. 102, 173 P. 118 (1918); *United States v. Elliot*, 41 P. 720, 722 (Utah Terr. 1895) (stating that reserved school lands are "public lands" in the sense of being owned by the federal government, but "they are not public lands in that they are open to entry."); *United States v. Bisel*, 19 P. 251, 253 (Mont. Terr. 1888) ("It is true that section 1945 reserves sections 16 and 36 in each township in the territory for public school purposes, and, while such reservation continues, such lands are *sub modo* segregated from the public domain; they are not open to settlement under the statutes regulating this subject; they would not pass under any granting act of congress that did not mention them; nor would they be embraced under the definition of "public lands," as given by Mr. Justice DAVIS in the case of *Newhall v. Sanger*, [92 U.S. 761 (1875)].").[3]

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[3] The New Mexico Court of Appeals incorrectly characterized the Organic Act reservation as merely a "promise" to grant a certain quantity of school lands in the future. App. 6a. In fact, the Organic Act had the immediate practical effect of precluding public entry of the reserved school sections for purposes of

(Continued on following page)

Thus, the Organic Act provided for the reservation of the lands for a specific federal purpose, and for their subsequent withdrawal once they were identified as available. Subsequent federal legislation preserved this intent in the context of new land disposal policies.

2. *Ferguson Act of 1898 (Act of Congress dated June 21, 1898), ch. 489, 30 Stat. 484 (1898).* New Mexico had been organized as a territory for an unprecedented 62 years before it was admitted as a state in 1912. Proclamation of Jan. 6, 1912, 37 Stat. 1723.[4] During that long wait, the state, not having title to the reserved lands, lacked the resources to support development of the civil infrastructure necessary to admission as a state on an equal footing. The Ferguson Act was enacted in anticipation of New Mexico's statehood and in recognition of the costs of delay in getting to that point. The Ferguson Act provided for a grant in trust of the school lands reserved by the Organic Act and additional quantities of land to support public institutions and infrastructure. *See* Ferguson Act §§ 1-3 and 6-7. Significantly, the Act provided for "indemnity" selection of lands to be granted in lieu of certain school sections which were excluded from the grant because they had been

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settlement when they were identified by the public land survey of a township.

[4] Similarly, Arizona was not admitted as a state until 1912. Joint Res. No. 8, August 21, 1911, 37 Stat. 39; Proclamation of Feb. 14, 1912, 37 Stat. 39.

classified as "mineral lands," had been reserved for other federal purposes, or had been homesteaded prior to completion of the public land survey. *Id.* at § 1. Congress thus assured that a certain quantity of lands would be dedicated to the purpose first expressed in the Organic Act reservation. *See United States v. Morrison*, 240 U.S. 192, 202 (1916) (discussing similar provision in Oregon Enabling Act).

However, the preservation of the federal purpose required further measures. Earlier grants of school lands had been dissipated through graft and mismanagement, thus frustrating the federal purpose. *Lassen*, 385 U.S. at 463-64. Thus, to assure that the land was used well and for the purpose for which it had been reserved, Congress imposed strict limitations on use and disposition, and required that the United States Secretary of the Interior approve any lease or sale as well as all investments made or securities purchased with the proceeds. Ferguson Act § 10. Further, all money received on account of the sale or leasing of such lands, after deducting expenses, was to be placed in separate funds to be used only for the purpose set forth in the Act. *Id.*

3. *New Mexico-Arizona Enabling Act of 1910 (Act of Congress dated June 29, 1910), Pub. L. 61-219, ch. 310, 36 Stat. 557 (1910).* In the New Mexico-Arizona Enabling Act, Congress confirmed and further extended the grant of school lands and expressly imposed strict fiduciary duties on the State with respect to management and disposition of these lands. In addition to section 16 and 36 in each township

reserved under the Organic Act and granted under the Ferguson Act, the Enabling Act granted sections 2 and 32 as school lands and provided for indemnity selections where those sections were unavailable. Enabling Act § 6; 43 U.S.C. §§ 851-852 (providing for the selection of "lieu" or "indemnity" lands); 43 U.S.C. § 854 (stating that §§ 851-852 supersede the Ferguson Act lieu land provisions). In keeping with the purpose of providing support for institutions and infrastructure needed to assure that New Mexico was entering the Union on an equal footing with other states, Congress provided for additional quantity grants in trust to support higher education, hospitals, and other civil institutions. Enabling Act § 7. Because these grants were made, in the first instance, as a quantity, no "lieu land" provisions were necessary.

In Section 10 of the Enabling Act, New Mexico was required to hold and manage the lands in a trust characterized by uniquely detailed limitations and requirements, enforceable by the Attorney General of the United States. These strict and federally enforceable trust requirements "marked a complete and absolute departure from the enabling acts under which other states were admitted to the Union." *Murphy v. State*, 181 P.2d 336, 344 (Ariz. 1947). By means of this trust arrangement, the purpose of the original Organic Act reservation was preserved in the retention of federal control imposed through the State's fiduciary duties and federal enforcement rights.

The New Mexico Constitution confirmed the State's acceptance of the grants and the conditions placed upon them. N.M. Const. art. XXII, § 12, art. XIV, §§ 1-2 and art. XXI, § 9.

4. *School Lands Act of 1927 (Jones Act) (Act of Congress dated Jan. 25, 1927), ch. 57, 44 Stat. 1026 (1850), 43 U.S.C. §§ 870-871 (as amended).* While the Enabling Act had excluded "mineral" lands from the grant of numbered school sections, the School Lands Act of 1927 (also known as the Jones Act) removed that exclusion, with the proviso that the State reserve the minerals during land sales and place all proceeds of mineral leases into the Enabling Act trust. Any attempted disposition contrary to the School Lands Act would result in forfeiture of the mineral estate to the United States "by appropriate proceedings instituted by the Attorney General." 43 U.S.C. § 870(b). Thus, the United States retained a reversionary interest in these lands, to be exercised in the event that there was an effort to dispose of the minerals in violation of the School Lands Act.

5. Because the Enabling Act and School Lands Act imposed extraordinary conditions on the use and disposition of trust lands, the State cannot use or dispose of those lands or their revenues for general state purposes. *Ervien v. United States*, 251 U.S. 41 (1919). The Commissioner manages the Enabling Act trust only to generate revenue for the support of 21 institutions and programs, primarily the state's public schools. Enabling Act §§ 6-7; N.M. Const. art. XII, § 12 and art. XIV, §§ 1-2; NMSA 1978 § 19-1-17

(2005) (permanent, income and current funds). At present, the land trust holds approximately 9 million acres of surface estate and approximately 13 million acres of mineral estate statewide.[5] Revenue is derived from grazing and agricultural leases, mineral and oil and gas royalties, and general business development. *See generally* NMSA 1978 Chapter 19, Articles 7-11 and 13. In addition, limited amounts of the trust's surface estate are sold subject to the required mineral reservation. *See* NMSA 1978 § 19-7-9 (1989). In accordance with the Enabling Act, the New Mexico Constitution and state statutes, all trust revenues are placed in permanent funds and current funds designated for the benefit of the supported institutions. *See* Enabling Act, § 10; N.M. Const. art. XII, § 2, 7 and 12; NMSA 1978 § 19-1-17 (2005) (establishing permanent funds) and § 19-1-18 (1996) (providing for distribution of revenues into permanent and current funds).

As of December 31, 2008, the New Mexico Enabling Act trust had generated a permanent fund valued at $7.9 billion,[6] and in Fiscal Year 2008 the trust provided roughly $546 million in support to its

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[5] Because sale of the mineral estate is prohibited under the School Lands Act and state law, NMSA 1978 §§ 19-7-25 (1912) and 19-7-27 (1925), the mineral estate acreage is substantially greater that the surface estate acreage.

[6] In the last year and a half, the value of the fund has plunged by approximately $2.8 billion due to market conditions and other factors.

designated institutions. As impressive as this may seem, the trust cannot be said to have succeeded in fulfilling its federal purpose. New Mexico's consistent ranking among the lowest states in the provision of public education suggests that the roughly 40% of the school budget provided by the trust is inadequate. Were it not for the discovery of oil and gas reserves, unknown at the time of the Enabling Act or earlier, the trust's arid lands would have generated only negligible income. Yet Congress, at that time aware that ranching and agriculture were the only viable uses for Western arid lands, sought to accomplish the settlement and education of New Mexico through the reservation and dedication of land as the resource to sustain that purpose.

When Congress established the Territory of New Mexico and reserved land for common schools, and later when Congress provided for the admission of New Mexico as a state, it had long been recognized that much of the land was arid and was valueless without irrigation. Neither the Organic Act, the Ferguson Act, nor the Enabling Act specified how water rights would be established with respect to the trust lands. Nonetheless, it was evident that much of the land would require irrigation in order for it to provide the support Congress intended. As shown in extensive data and analysis which the Commissioner submitted to the District Court, (i) the trust needs additional funds to support public education, (ii) the use of groundwater underlying the trust lands would substantially enhance the support the trust provides

to public education; and (iii) federal reserved water rights can be administered in a manner that protects the interests of current users.

Due to the strictness of the trust terms, the Commissioner can only use trust revenues for the support of denominated state institutions and programs. No trust income can be diverted toward improvement of the trust lands. *Lake Arthur Drainage District v. Field*, 27 N.M. 183, 199 P. 112 (1921). The development of water rights and water resources on state trust lands is thus not an option for the Commissioner. The Commissioner must rely on trust land lessees to improve the lands by appropriating water for beneficial use on those lands; but those lessees would prefer, whenever possible, to develop such valuable resources on their adjacent lands. Because the acquisition water rights under the state law of prior appropriation is thus an uncertain source of creating the needed value in the trust lands, and because oil and gas revenues are expected to diminish as reserves become more scarce, the Commissioner is seeking to confirm the trust's reserved water rights in an effort to generate the support that Congress envisioned.

6. The general stream adjudication regarding the San Juan River Basin was commenced on March 13, 1975, when the State Engineer filed a complaint pursuant to NMSA 1978 §§ 72-4-15 through 19

(1907)[7] and 43 U.S.C. § 666(a). The subfile proceeding[8] from which this Petition arises concerned a Declaration of State of New Mexico Trust Reserved Water Rights, which described the general premises upon which the Commissioner anticipated claiming federal reserved water rights as part of the adjudication. In the subfile proceeding, the court compelled the Commissioner to file a Motion for Declaratory Relief seeking to establish a general right to claim federal reserved water rights appurtenant to the trust lands, and the State Engineer simultaneously filed a motion seeking a summary judgment "adjudicating that [the Commissioner] has no water rights arising under federal law." The District Court subsequently entered an order allowing intervention in the subfile proceeding by the United States, the Jicarilla Apache Nation, the Navajo Nation, the Ute Mountain Ute Tribe, the San Juan Water Commission, the Bloomfield Irrigation District, Gary Hoerner, Public

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[7] The State Engineer is authorized to perform a hydrographic survey of a stream system and then direct the Attorney General to enter suit on behalf of the State to determine all rights to use water in the stream system.

[8] In general, a "subfile" proceeding is one in which issues specific to a particular water rights claimant are determined as between the plaintiff (usually the State Engineer) and the claimant. The determination of the claimant's water right, if any, then becomes subject to an "*inter se*" proceeding in which other parties who did not participate in the subfile proceeding may contest the determination of the claimant's water right. *See generally Parker Townsend Ranch*, *supra*; Rule 1-072.2 of the New Mexico Rules of Civil Procedure.

Service Company of New Mexico and BHP Navajo Coal Company.[9]

On February 20, 2007, the District Court issued a Decision denying the Commissioner's Motion for Declaratory Relief and granting the State Engineer's Motion for Summary Judgment. App. 33a-41a. On March 15, 2007, the District Court entered an Order and Final Judgment, which included a determination that it constituted an immediately appealable final judgment. App. 42a-46a.

7. In affirming the District Court judgment, the New Mexico Court of Appeals said that federal reserved water rights are "very problematic" in the context of New Mexico's prior appropriation doctrine and arid conditions, under which certain streams are fully appropriated and a federal reserved right may require a reduction in the water available to private appropriators. As a result, the Court of Appeals concluded that the federal reserved rights doctrine should be narrowly construed. App. 19a. The court's conclusion, however, was premised on its assertion that "as demonstrated by this case, claims to federal

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[9] The Arizona State Land Department, which is raising a similar reserved water rights issue in two Arizona state court water rights adjudications, sought leave to file an *amicus curiae* brief with the District Court in this case, and leave was initially granted and then denied. On appeal, the New Mexico Court of Appeals granted the Arizona State Land Department leave to file an *amicus curiae* brief in support of the Commissioner's reserved water rights claim.

reserved water rights are potentially very large with very early priority dates and can therefore be highly disruptive to rights under existing state law." *Id.* Because the factually intense issues of quantification and priority were specifically precluded from consideration by the District Court, this premise of the Court of Appeals was unfounded and improper.

Examining the first element of the reserved rights doctrine, the Court of Appeals found that neither the New Mexico Organic Act, nor the Ferguson Act, nor the New Mexico Enabling Act had effected a withdrawal of the land from the public domain and a reservation for a public purpose sufficient to qualify for a reserved water right. Casting aside any "plain language" rule of construction, and without reference to the 125-year history of this particular usage by Congress, the Court of Appeals declared, "[T]he mere use of the term 'reserved' in a congressional act does not necessarily create a federal withdrawal and reservation of land." App. 23a (citing *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 785 (10th Cir. 2005)). However, in every instance of this particular usage by Congress, the result was that designated lands, or their equivalent in value, were dedicated to a federal purpose and withdrawn from the public domain. This is what is required under the logic and principles of

the reserved rights doctrine,[10] not a rigid and formulaic mechanism for "withdrawal and reservation" such as the state court employed. *Cf. Winters*, *supra* (seminal reserved water rights case recognizing reserved rights for the Fort Belknap Reservation, which consisted simply of the lands remaining after ceding to the United States "a very much larger tract"); *Arizona v. California*, *supra* (finding reserved rights attached to the Colorado River Reservation which was created by Act of Congress, increased by executive order, and further increased by amendment to executive order).

The Court of Appeals further found that the grant of lands in a federally enforceable trust did not constitute a "withdrawal and reservation" for purposes of the reserved rights doctrine (a) because the exact location of the trust lands was to be determined by the public land survey, which had not been completed in all parts of the state, (b) because some of the lands identified by survey were nonetheless excluded from the grant and subject to "lieu" land selection by the state, and (c) because the land remained subject to alternative federal reservation or disposal before its identification by survey and vesting of title in the state. App. 24a-26a.

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[10] *See Cappaert*, 426 U.S. at 145 ("determination of reserved water rights . . . derives from the federal purpose of the reservation").

Examining the second element of the reserved rights doctrine, the Court of Appeals found that the congressionally mandated purpose for the land trust (support of common schools) was not a sufficient "federal purpose" to establish a reserved water right. According to the Court of Appeals, "As the term 'federal purpose' has been construed in non-Indian federal reserved water rights cases, continuing federal ownership of the reserved lands appears to be a prerequisite to a determination that such rights exist." App. 27a. The Court then conceded that federal reserved rights were conveyed when certain Indian reservation lands were conveyed to individual Indian allottees, and thus "federal reserved water rights are not dependent on continuing federal ownership." App. 28a-29a (citing *United States v. Powers*, 305 U.S. 527, 532 (1939)). It sought to distinguish this from the trust lands by pointing out that "the federal government, by treaty, withdrew the land at issue from the public domain and reserved it for a federal purpose *before* it was allotted and conveyed to individual tribal members." *Id.* (emphasis in original). However, this is exactly how the federal government disposed of the trust lands at issue here: the Organic Act reservation dedicated the lands to a federal purpose (public education) and provided for withdrawal from public entry upon survey. Only later, under the Ferguson and Enabling Acts, did the government part with ownership.

The Court of Appeals further rejected the Commissioner's contention that the imposition of federal

trust terms on the granted lands and ongoing federal power to enforce the trust terms demonstrates a federal purpose for the trust. App. 27a-28a. The Opinion does not explain why federal title ownership, rather than federal control, is relevant to the reserved rights doctrine. In either case, the federal purpose is sustained by the federal control over the use of the land.

In addition, the Court of Appeals found that Congress took measures to ensure that New Mexico schools would derive adequate support from the trust lands despite the arid conditions that prevail in much of the state, rendering much of the trust land valueless without a supply of water. First, the Court of Appeals noted that New Mexico and Arizona were granted four sections in each township, as opposed to the one or two sections granted to other states, in recognition of the arid conditions in the two states. App. 30a (citing *Lassen,* 385 U.S. at 463 n.7). However, doubling the amount of land that is valueless for lack of water would not provide the resource needed for support of the federal purpose; and there is no indication this was intended as full compensation. Second, the Court of Appeals noted that the Ferguson Act grants included a grant of 500,000 acres of land for the purpose of establishing permanent water reservoirs for irrigation. App. 30a-31a (citing Ferguson Act § 6). However, these reservoirs were to serve the entire state, and thus were not intended to add the needed value to trust lands.

REASONS FOR GRANTING THE PETITION

I. THE NEW MEXICO COURT OF APPEALS OPINION PRESENTS A SIGNIFICANT QUESTION OF FIRST IMPRESSION REGARDING APPLICATION OF THE FEDERAL RESERVED WATER RIGHTS DOCTRINE TO MILLIONS OF ACRES OF SCHOOL LANDS IN ARID WESTERN STATES.

The New Mexico Court of Appeals decision is the first reported decision determining whether reserved water rights may be asserted with respect to lands reserved for school purposes and granted to a state in trust. In two Arizona state court water rights adjudications, the Arizona State Land Department has asserted a similar reserved water rights claim as to Arizona's trust lands. In a Special Master report and recommended decision entered jointly in the two cases, the Special Master found that federal reserved water rights may not be claimed with respect to the trust lands in Arizona. Objections were filed, and the Superior Court has yet to rule on those objections. Thus, there is at least a potential for a conflicting decision with respect to Arizona's trust lands.

In *United States v. New Mexico*, *supra*, the most recent of the Court's reserved rights decisions, the Court said that "many of the contours of what has come to be called the 'implied-reservation-of-water doctrine' remain unspecified." *Id.*, 438 U.S. at 700. The reserved water rights issue is one of "implied intent" based on what the federal government has

done in setting aside land from the public domain. *Id.* at 698. Thus, a reserved water rights claim requires that the courts "carefully examine[] both the asserted water right and the specific purposes for which the land was reserved." *Id.* at 700.

Here, the state court decision is the first decision in an area of federal law that potentially affects other Western states with similarly reserved and granted school lands. Because extending the doctrine to school lands in arid states such as New Mexico and Arizona presents an important federal law issue which has not yet been addressed by this Court, the Court should grant review of the state court's judgment.

II. THE NEW MEXICO COURT OF APPEALS OPINION DECIDES AN IMPORTANT FEDERAL LAW QUESTION IN A WAY THAT HAS PROFOUND IMPLICATIONS FOR FEDERAL LAND TRUSTS IN SEVERAL STATES AND FOR NUMEROUS WATER RIGHTS ADJUDICATIONS.

This Court has previously granted review in various cases pertaining to administration of the Enabling Act trusts to ensure that the trusts are administered in accordance with federal law. *See ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989); *Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295 (1976); *Lassen, supra*; *Payne v. New Mexico*, 255 U.S. 367 (1921); *Ervien v. United States, supra*. Issues related to Mississippi trust lands and their proceeds were reviewed in *Papasan, supra*, and the Court is

currently hearing a case regarding trust lands in Hawaii. *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 30 (2008). Thus, the Court previously has recognized that administration of the federally created land trusts involve important federal law issues. *See Lassen*, 385 U.S. at 461 (recognizing "the importance of the issues presented both to the United States and to the States which have received such lands").

Contrary to established federal law, the state court based its decision on a narrow interpretation of the federal reserved rights doctrine. Conversely, this Court has "recognized that the legislation of Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively," *Wyoming v. United States*, 255 U.S. 489, 508 (1921), and lower federal courts have recognized implied rights that are needed to ensure that the lands serve the purpose Congress intended. *See, e.g., In re Schugg (Lyon v. Gila River Indian Community)*, 384 B.R. 263, 279 (D. Ariz. 2008) (citing *Utah v. Andrus*, 486 F.Supp. 995, 1001-02 (D. Utah 1979)). In holding that the federal Department of the Interior could not prohibit access to Utah trust lands or otherwise restrict their use in such as way as to make economic development competitively unprofitable, the *Andrus* court said:

> Recognition of the special nature of the school land grants is important both in determining the Congressional intent behind the grant and in understanding judicial

> treatment of similar grants. Generally, land grants by the federal government are construed strictly, and nothing is held to pass to the grantee except that which is specifically delineated in the instrument of conveyance. [Citation omitted.] *But the legislation dealing with school trust land has always been liberally construed.* [Citations omitted.] Further, it is clear that one of Congress' primary purposes in enacting the legislation was to place the new states on an "equal footing" with the original thirteen colonies and to enable the state to "produce a fund, accumulated by sale and use of the trust lands, with which the State could support the (common schools)." *Lassen v. Arizona Highway Dept.*, 385 U.S. 458, 463, 87 S.Ct. 584, 587, 17 L.Ed.2d 515 (1967).
>
> *Given the rule of liberal construction and the Congressional intent of enabling the state to use the school lands as a means of generating revenue*, the court must conclude that Congress intended that Utah (or its lessees) have access to the school lands. Unless a right of access is inferred, *the very purpose of the school trust lands would fail.* Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend.

Id., 486 F.Supp. at 1001-02 (emphasis added).

This clear emphasis on liberal construction when inferring rights necessary to the functioning of

"school lands" was ignored by the state court. If that decision is left to stand, it could form the basis for denying federal reserved water rights to other state trust lands and other federal entities seeking reserved rights in the multiple water rights adjudications ongoing in the Western states.

Of equal import is the state court's assertion that federal reserved water rights should not interfere with "predominant" state law water rights. App. 19a. As this Court said in *United States v. New Mexico*, *supra*, "[W]hatever powers the states acquired over their waters as a result of congressional Acts and admission into the Union, . . . Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes." *Id.* at 698. Thus, while the Desert Land Act of 1877, 43 U.S.C. § 321 (1994), generally requires that water rights for federal lands be acquired in accordance with state law, federal law continues to prevail as to lands set aside from the public domain for specific federal purposes. *Id.*

In each of the seminal federal reserved rights cases, the federal government set aside land from the public domain for a specific purpose, and the courts examined the circumstances and purposes of the federal action to determine whether a federal interest in the appropriation of water to achieve the federal purpose superseded state regulation. *Winters*, *supra*, pitted the State of Montana's interest in allocating

water to local residents against the need for water to achieve the purpose of the treaty in which the federal government and an Indian tribe established the tribe's reservation. *See also Arizona v. California*, 373 U.S. at 598-601 (applying *Winters* doctrine to find federal reserved right for Indian reservations, national recreation area, national wildlife refuges, and national forest). In *Cappaert*, *supra*, the need for water to serve the federal interest in protecting the national monument habitat of a rare species prevailed over state regulation. Finally, in *New Mexico*, the Court held that state water law could not interfere with the appropriation of water needed to achieve the primary purpose for which a national forest was established.

When presented with a claim that there are federal reserved water rights, the courts generally make two distinct sets of determinations. First, applying the standards set out in *Winters* and *Cappaert*, courts make an initial determination of whether a right to use water was implicitly reserved at the time that the land was reserved. The courts have taken a liberal approach in determining whether a reserved water right exists, giving due regard to the paramount federal interests that were at stake in exempting the reserved land from the application of laws pertaining to the public domain. Second, in determining the quantity of water needed to serve the federal purpose of reserving the land, the courts have taken a more circumscribed view of the extent of the water right. *Cf. United States v. New*

Mexico, 438 U.S. at 698-701. The state court decision seeks to reverse this established pattern of federal law, or to carve out a novel exception. In either case the decision warrants review by this Court.

In finding that federal reserved water rights do not attach to the trust lands under any circumstances, the New Mexico Court of Appeals applied the reserved rights doctrine in a manner that misconstrues the Congressional acts reserving and granting the lands in trust and misconstrues the underlying federal purpose of those acts. That federal reserved water rights accompany the lands reserved and granted in trust by Congress follows from the analysis outlined in *Cappaert*, 426 U.S. at 138, and *United States v. New Mexico*: (1) determining whether lands were reserved; (2) determining what purpose the federal government sought to achieve by reserving the lands; and, (3) determining whether unappropriated water was impliedly reserved because it is necessary to the purpose for which the lands were reserved. Rather than applying these factors with an eye toward what Congress intended to achieve, the state court focused on the mechanics of the reservation and withdrawal process involved, and in the process subordinated federal interests to state law.

The state court's cramped view of the reserved water rights doctrine highlights the fact that this is a case of first impression. Lacking precedent recognizing reserved water rights for school lands, the court distinguished school lands from lands with recognized

reserved water rights in ways that simply do not negate the existence of an implied congressional intent to reserve a water right.

Further, in rejecting the Commissioner's federal reserved water rights claim, the New Mexico Court of Appeals leaves a situation where ongoing appropriation of water and establishment of water rights priorities under state prior appropriation doctrine will leave no unappropriated water available for use on the trust lands as other products of the land are depleted and as increasing population and development make possible other productive uses of the land that depend upon the right to use appurtenant water. In setting aside a resource to support vital civic institutions such as public schools, Congress clearly did not intend that the appropriation of water prior to development on the trust lands would render certain trust lands permanently undevelopable when a water right of sufficient priority would provide the means of achieving the purpose for which the trust lands were reserved.

The equal footing doctrine balances the right of sovereign states to provide for the health, education and welfare of their residents, and the federal interest in assuring that all citizens of the United States have equal opportunities. New Mexico's Enabling Act trust represents one of the more fully articulated outgrowths of this balance. It acknowledged the sovereignty of the state by making the state, rather than the federal government, the trustee, and it preserved the integrity of the federal purpose by

reserving a perpetual resource to support schools and other infrastructure needed for good government.

The federal reserved water rights doctrine provides a companion balancing. The state law of prior appropriation encourages the pursuit of private interests in a market economy, while the federal reservation of land and related resources in a perpetual trust seeks to ensure a public benefit which conflicts with the consumption of those resources for private benefit. By recognizing a reserved right to use water appurtenant to the trust lands, the courts would balance state sovereignty and state law against broader federal purposes. State law and sovereignty are subordinated only to the extent necessary to assure the accomplishment of the federal purpose underlying the reservation. At this point in the proceedings, the Commissioner is seeking recognition of the federal portion of that balancing equation. The balancing itself will come at a later phase when the courts determine the amount of water that is reserved for the trust lands.

In similar arid land circumstances, the Court has inferred that the reservation of land for Native American tribal homelands, national forests, and protection of endangered species implicitly included a reservation of the right to use water to achieve the federal purpose inherent in reserving the land. Congress' reservation of a resource for present and future generations of New Mexicans is equally worthy of recognition.

It is an inescapable fact that under state prior appropriation water law doctrine only those with the current financial resources to buy water rights or put water to beneficial use will have water to use in the future. Future generations of New Mexicans who will pass through its schools cannot compete in today's auction. The record demonstrates there will be no unappropriated water available for use on trust lands. That resource is being rapidly appropriated by burgeoning populations overlying aquifers on private lands and private industrial development. As it stands now, the Commissioner can only stand by and watch as the resources intended by Congress for his beneficiaries are depleted by others. This case will determine whether Congress intended this unfortunate result.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

ROBERT A. STRANAHAN, IV
General Counsel
STEPHEN G. HUGHES
JOHN L. SULLIVAN
NEW MEXICO STATE
LAND OFFICE
P.O. Box 1148
Santa Fe, New Mexico
87504-1148
(505) 827-5713

TANYA L. SCOTT
Counsel of Record
LAW & RESOURCE PLANNING
ASSOC. P.C.
201 Third Street NW,
Suite 1750
Albuquerque, New Mexico
87102-3353
(505) 346-0998

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: September 24, 2008

NO. 27,654

STATE OF NEW MEXICO ex rel. STATE ENGINEER,

Plaintiff-Appellee,

and

UNITED STATES OF AMERICA, JICARILLA APACHE NATION, NAVAJO NATION, UTE MOUNTAIN UTE TRIBE, SAN JUAN WATER COMMISSION, and BHP NAVAJO COAL COMPANY,

Defendants/Intervenors-Appellees,

v.

COMMISSIONER OF PUBLIC LANDS FOR THE STATE OF NEW MEXICO,

Defendant-Appellant.

APPEAL FROM THE
DISTRICT COURT OF SAN JUAN COUNTY
Rozier E. Sanchez,
District Judge Pro Tempore

Gary K. King, Attorney General
DL Sanders, Chief Counsel
Tracy L. Hofmann, Special Assistant
Attorney General
Santa Fe, NM

for Appellee

United States Department of Justice, Environment
& Natural Resources Division
Ronald J. Tenpas, Assistant Attorney General
David W. Gehlert
Mark R. Haag
Washington, D.C.

for Appellee United States of America

Holland and Knight
Shenan R. Atcitty
Albuquerque, NM

for Appellee Jicarilla Apache Nation

Navajo Nation Department of Justice
Stanley M. Pollack
Bidtah Becker
Window Rock, AZ

for Appellee Navajo Nation

Daniel H. Israel
Boulder, CO

for Appellee Ute Mountain Ute Tribe

Taylor & McCaleb, P.A.
Jolene L. McCaleb
Elizabeth Newlin Taylor
Corrales, NM

for Appellee San Juan Water Commission

Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Maria O'Brien
Walter E. Stern
Albuquerque, NM

for Appellee BHP Navajo Coal Company

New Mexico State Land Office
Robert A. Stranahan, IV, General Counsel
Stephen G. Hughes, Associate Counsel
John L. Sullivan, Associate Counsel
Santa Fe, NM

for Appellant

Ryley Carlock & Applewhite
James M. Noble
Denver, CO

for Amicus Curiae Freeport-McMoRan Corporation

Tanya Trujillo
Christopher D. Shaw
Santa Fe, NM

for Amicus Curiae New Mexico Interstate
Stream Commission

Gallegos Law Firm, P.C.
J.E. Gallegos
Michael J. Condon
Santa Fe, NM

Terry Goddard, Attorney General
Patrick B. Sigl, Assistant Attorney General
Phoenix, AZ

for Amicus Curiae State of Arizona

OPINION

WECHSLER, Judge.

{1} This appeal arises from a district court subfile proceeding in the course of a general adjudication of water rights in the San Juan River stream system. At issue is the applicability of the federal reserved water rights doctrine to state lands that the federal government granted and conveyed to New Mexico in trust for the purpose of supporting New Mexican schools. As the manager and acting trustee for New Mexico's trust lands, the Commissioner of Public Lands for the State of New Mexico (the Commissioner) asserted a claim in the underlying adjudication for federal reserved water rights. The Commissioner argued that by legislatively designating specific sections of land to be used for the support of New Mexican schools and conveying them in trust to New Mexico, the United States Congress also impliedly intended to reserve and convey water rights in those lands. The State Engineer of the State of New Mexico (the State Engineer) and several other interested

parties opposed the Commissioner's claim. Ultimately, the district court granted summary judgment in favor of the parties opposing the Commissioner. For the reasons that follow, we affirm the district court's decision and hold that the federal reserved water rights doctrine does not apply in this case.

HISTORICAL BACKGROUND

{2} Since 1802, the United States Congress has passed enabling acts that have granted federal lands to each new "public-land" state admitted to the Union for the purpose of supporting its schools. *Andrus v. Utah,* 446 U.S. 500, 506 (1980). Unlike the original thirteen states, many newly created states, including New Mexico, encompassed vast tracts of federal land that were immune from taxation. *Id.* at 522 (Powell, J., dissenting). In order to put those new states on equal footing with the original thirteen states in generating revenue for the public good, Congress granted them "a fixed proportion of the lands within [their] borders for the support of public education" in exchange for a "pledge not to tax" the granted lands. *Id.* at 523. Following approval of the federal survey, "[t]itle to the sections vested in the [s]tate." *Id.* Thereafter, the state became subject to "a binding and perpetual obligation to use the granted lands for the support of public education," and "[a]ll revenue from the sale or lease of the school grants was impressed with a trust in favor of the public schools." *Id.* at 523-24.

{3} Congress first promised some of the school trust lands at issue in this case in the Organic Act of 1850. *See* ch. 49, § 15, 9 Stat. 446, 452 (1850). Several decades later, Congress enacted the Ferguson Act of 1898, ch. 489, § 1, 30 Stat. 484, 484 (1898), which granted to the Territory of New Mexico the lands promised in the Organic Act, along with some additional lands. Finally, Congress conveyed the school trust lands at issue in this case to the State of New Mexico in the Enabling Act of 1910, ch. 310, §§ 1, 10, 36 Stat. 557, 557-58, 563 (1910), which authorized the establishment of the State. The Enabling Act included additional lands and transferred to the State the lands that Congress had previously granted to the Territory in the Ferguson Act. *See* Enabling Act §§ 6-10, 36 Stat. at 561-65. The Enabling Act also imposed specific trust obligations upon the State with respect to its management of the lands, including detailed limitations on the State's use of the proceeds from the sale, rental, and use of them. *See id.* § 10, 36 Stat. at 563-64. In this case, the Commissioner relies on these statutes in support of his claim to federal reserved water rights in New Mexico's school trust lands, and we will discuss each statute in greater detail in our analysis of the merits of the Commissioner's claim.

PROCEDURAL BACKGROUND

{4} On March 13, 1975, the State Engineer commenced the general stream adjudication at issue in this case by filing a complaint in district court. Roughly nineteen years later, on August 13, 2004, the

Commissioner became involved in the adjudication by filing a "Declaration of State of New Mexico Trust Reserved Water Rights" (Declaration). The Commissioner's Declaration described the basis upon which he anticipated claiming federal reserved water rights as part of the adjudication. In doing so, the Commissioner claimed, under federal law, the state trust's entitlement to reserved surface and groundwater rights for approximately 281,155 acres of school trust land within the San Juan Groundwater Basin. After the district court set a briefing schedule regarding the Commissioner's Declaration, the Commissioner attempted to either withdraw or dismiss his Declaration without prejudice by invoking Rule 1-041(A)(1)(a) NMRA. The district court refused to allow the Commissioner to withdraw or dismiss his Declaration, and this Court subsequently denied the Commissioner's petition for an interlocutory appeal of that ruling.

{5} On June 15, 2006, the State Engineer petitioned for the commencement of a subfile proceeding on the Commissioner's Declaration. In the subfile proceeding, the Commissioner moved for declaratory relief with respect to his argument that there existed federal reserved water rights in New Mexico's school trust lands, and the State Engineer moved for summary judgment that no such rights existed in those lands. Shortly thereafter, the United States, along with several other interested parties, intervened in the proceeding.

{6} On February 20, 2007, the district court issued an order denying the Commissioner's request for declaratory relief and granting summary judgment in favor of the State Engineer. In doing so, the district court concluded that the federal reserved water rights doctrine did not apply to the school trust lands at issue in this case and set forth several reasons why the Commissioner's claim failed. First, the district court found that the "specific purpose" argued by the Commissioner as the basis for Congress's decision to convey the trust lands did not, under the applicable federal case law, require a conclusion that it also impliedly reserved water rights. Specifically, the district court reasoned that the application of water to the land was not a direct purpose of granting the land. *See, e.g., United States v. New Mexico,* 438 U.S. 696, 716-17 (1978) (explaining that when a potential use of water is not "a direct purpose of reserving the land," there can be no finding of an implied reservation of water rights). Second, the district court noted that unlike the federal reservations that have been held to include federal reserved water rights, the United States did not retain any ownership interest in the school trust lands. *See, e.g., Cappaert v. United States,* 426 U.S. 128, 131-32, 138 (1976) (concluding that Congress impliedly reserved water rights in land owned by the United States that was "set aside as a national monument"). Finally, the district court concluded that congressional intent to reserve water rights in the school trust lands could not be inferred because "Congress made no declaration in [the legislation upon which the Commissioner relies] that the

New Mexico Education System, without water, would be entirely defeated." *See New Mexico*, 438 U.S. at 700 ("Each time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."). Based on these findings, the district court concluded that the Commissioner failed to meet his burden of showing that (1) Congress intended to withdraw and reserve federal lands "for New Mexico Trust Lands as a federal purpose" and (2) "Congress intended to reserve, by implication, appurtenant waters to accomplish educational purposes in New Mexico Trust Lands." The Commissioner appeals from that ruling.

WITHDRAWAL OR DISMISSAL UNDER RULE 1-041

{7} We first address the Commissioner's contention that the district court erred in refusing to allow him to withdraw or dismiss his Declaration. The Commissioner argues that he had an "unconditional" right to withdraw or dismiss his Declaration without prejudice under either Rule 1-041(A)(1)(a) or Rule 1-041(C). In response, the parties opposing the Commissioner argue that (1) Rule 1-041 does not apply to the Commissioner's Declaration; (2) even if Rule 1-041 were applicable, the Commissioner would not have an unconditional right to withdraw or dismiss his Declaration; and (3) the district court properly

refused to allow the Commissioner to withdraw or dismiss his Declaration. We review de novo the issue of whether the Commissioner had an unconditional right to voluntarily withdraw or dismiss his Declaration without prejudice under Rule 1-041. *See Becenti v. Becenti,* 2004-NMCA-091, ¶ 6, 136 N.M. 124, 94 P.3d 867 ("[W]hen called upon to apply and interpret rules of civil procedure, we review these questions de novo.").

{8} We first observe that, by its terms, Rule 1-041(A)(1)(a) does not apply to the Commissioner's Declaration. Rule 1-041(A)(1)(a) provides that "an *action* may be dismissed by the *plaintiff* without order of the court . . . by filing a notice of dismissal at any time before service by the adverse party of an answer or other responsive pleading." (Emphasis added.) In this case, the Commissioner is not a "plaintiff" in the underlying adjudication, which is a special statutory proceeding commenced by the State Engineer. *See* NMSA 1978, § 72-4-15 (1907) (stating that it is, in most instances, the responsibility of the attorney general, at the request of the state engineer, to file suit to determine the respective rights of individual parties to appropriate water from a stream system). Additionally, the Commissioner's Declaration does not constitute an "action" that can be voluntarily dismissed. We view the Declaration as a single claim within the overarching water adjudication action brought by the State Engineer in 1975, and as such, Rule 1-041(A) does not permit a voluntary dismissal of the Declaration. *See Gates v. N.M. Taxation &*

Revenue Dep't, 2008-NMCA-023, ¶ 12, 143 N.M. 446, 176 P.3d 1178 (explaining that Rule 1-041(A) does not permit a plaintiff to dismiss less than all of the claims that make up an action). Finally, no responsive pleading was required, or even allowed, in this case with respect to the Commissioner's Declaration. *Compare* Rule 1-012(A)-(B) NMRA (explaining the procedure that a defendant in a civil action is required to follow in filing a responsive pleading), *with* NMSA 1978, § 72-4-17 (1965) (explaining the procedure that the district court must follow in determining the water rights of individual claimants with respect to a stream system).

{9} Alternatively to his purported right to voluntarily dismiss his Declaration under Rule 1-041(A), the Commissioner argues that Rule 1-041(C) governs. Rule 1-041(C) allows for the same type of voluntary dismissal described in Rule 1-041(A) for "any counterclaim, cross-claim or third-party claim." However, we agree with the State Engineer that the Commissioner's Declaration does not fall under this rule. We simply cannot characterize his Declaration as either a counterclaim, a cross-claim, or a third-party claim. *See* Rule 1-013(A)-(B) NMRA (explaining that a counterclaim is a claim that a defendant in a civil action has against a plaintiff in the same action); Rule 1-013(G) (explaining that a cross-claim is a claim that one party in a civil action has against a co-party in the same action); Rule 1-014(A) NMRA (explaining that a defendant in a civil action may make a third-party claim against "a person not a

party to the action who is or may be liable to him for all or part of the plaintiff's claim against him").

{10} Furthermore, even if we were to conclude, contrary to our legal holding above, that the Commissioner was a plaintiff and that his Declaration was an action, counterclaim, cross-claim, or third-party claim subject to Rule 1-041, our result would not change. The purpose of Rule 1-041(A) "is to preserve a plaintiff's right to dismiss an action unilaterally, but to limit that right to an *early stage* of the litigation." 8 James W. Moore, *Moore's Federal Practice* § 41.33[1], at 41-45 (3d ed. 2007) (emphasis added). "The rule is thus intended to fix the point at which the resources of the court and the defendant are so committed that dismissal without preclusive consequences can no longer be had as of right." *Id.* § 41.33[1], at 41-45 to -46 (internal quotation marks and citation omitted). The stream adjudication at issue in this case is over thirty years old, the notice of withdrawal of the Declaration was filed nearly a year after the filing of the Declaration, and a delay in the litigation of the substance of the Commissioner's claim would cause even further unnecessary delay, waste judicial resources, and trigger great uncertainty regarding the individual claimants' respective water rights.

{11} Accordingly, we agree with the district court that Rule 1-041 was not a procedural vehicle that was available to the Commissioner in this case. We therefore proceed to address the merits of the federal reserved water rights claim that the Commissioner made in his Declaration.

SUMMARY JUDGMENT

A. Standard of Review

{12} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. In reviewing whether a genuine issue of material fact exists, "we view the facts in the light most favorable to the party opposing summary judgment." *Gormley v. Coca-Cola Enters.*, 2005-NMSC-003, ¶ 8, 137 N.M. 192, 109 P.3d 280 (internal quotation marks and citation omitted). Ultimately, we review de novo the legal question of whether a party is entitled to summary judgment as a matter of law. *Id.*

{13} The Commissioner argues that the question of implied congressional intent to create federal reserved water rights presents a factual issue to be decided by a factfinder and that the district court therefore erred in concluding that no such rights exist in the school trust lands as a matter of law. However, whether a particular act of Congress establishes a federal reservation with attendant implied water rights is a question of legislative intent that requires an interpretation of the relevant acts. *See Cappaert,* 426 U.S. at 139 ("In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water."). Such matters are traditionally

legal questions that may properly be resolved on summary judgment. *See Union Pac. Land Res. Corp. v. Moench Inv. Co.*, 696 F.2d 88, 93 n.5 (10th Cir. 1982) ("Questions of statutory construction and legislative history traditionally present legal questions properly resolved by summary judgment."). Other aspects of federal reserved water rights, beyond the mere existence of such rights in a given piece of land, may involve questions of fact that should not be decided on summary judgment. For example, a determination of the quantity of water reserved (i.e., the minimum amount necessary to accomplish the purpose of the reservation) would likely involve factual issues that would require the factfinder to consider expert testimony. *See, e.g., United States v. Washington,* 375 F. Supp. 2d 1050, 1066 (W.D. Wash. 2005) (noting that the quantity of water impliedly reserved in an Indian reservation under a treaty was "a factual issue to be determined at trial"). However, the only issue in the present case involves whether certain acts of Congress can be interpreted to impliedly create *any* federal reserved water rights in New Mexico's school trust lands. Any inquiry relating to the nature and quantity of the rights that the Commissioner claims is not before this Court. Thus, we are presented with questions of law that the district court was permitted to decide on summary judgment and that we must now review de novo.

B. The Federal Reserved Water Rights Doctrine and Its Relationship to State Water Law

{14} The federal reserved water rights doctrine is a judicially created doctrine that had its genesis in *Winters v. United States,* 207 U.S. 564 (1908). In *Winters,* the United States Supreme Court recognized and affirmed the power of the federal government, under certain circumstances, to impliedly reserve water and exempt it from appropriation under state law. *Id.* at 577. In doing so, the Court concluded that when Congress established the Fort Belknap Indian Reservation in Montana, it also impliedly reserved with it the right to the amount of water necessary to achieve the reservation's purpose. *Id.* at 565, 577. Subsequent United States Supreme Court decisions extended the doctrine to other, non-Indian federal enclaves. *See, e.g., Cappaert,* 426 U.S. at 138 (finding that the reservation of a national monument by executive order also included federal reserved water rights); *Arizona v. California,* 373 U.S. 546, 601 (1963) (concluding that "the principle underlying the reservation of water rights for Indian Reservations" could be extended to national recreation areas and national forests), *disavowed on other grounds by California v. United States,* 438 U.S. 645, 674 (1978). As elaborated on and defined in these decisions, the doctrine currently requires a claimant to establish two elements in order to demonstrate the existence of a federal reserved water right: (1) that the federal government withdrew the land from the public

domain and reserved it for a federal purpose and (2) that a certain amount of water is necessary to accomplish the purpose for reserving the land. *See Cappaert,* 426 U.S. at 138.

{15} Overall, the doctrine of federal reserved water rights represents a limited exception to the general rule that individual states govern water rights within their respective borders. *See New Mexico,* 438 U.S. at 702 ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."). Generally, water rights must be obtained by appropriation under state water law, even if those rights are developed in land owned by the federal government. *See Cal. Or. Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 163-64 (1935) (stating that "following the [Desert Land Act] of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain"). In New Mexico, water law is governed by the doctrine of prior appropriation. *Walker v. United States,* 2007-NMSC-038, ¶ 21, 142 N.M. 45, 162 P.3d 882. Under that doctrine, "water rights are both established and exercised by beneficial use, which forms the basis, the measure and the limit of the right to use of the water." *Id.* ¶ 22 (internal quotation

marks and citation omitted). The appropriation of water for beneficial use establishes the priority date of a water right in relation to other water rights, and the full right of an earlier appropriator will be protected, to the extent of that appropriator's use, against a later appropriator. *See* N.M. Const. art. XVI, § 2 ("Priority of appropriation shall give the better right."). However, because the prior appropriation doctrine rewards the use of water – and use determines both the priority date and quantity of water to which one holds a right under the doctrine – state water rights can be forfeited by non-use. *State ex rel. Reynolds v. S. Springs Co.*, 80 N.M. 144, 148, 452 P.2d 478, 482 (1969) ("[U]nder the prior appropriation doctrine of water rights applicable in New Mexico, nonuse involves forfeiture." (internal quotation marks and citation omitted)).

{16} Similar to water rights developed under our state law, federal reserved water rights have the attributes of priority and quantity, allowing such rights to be administered within the hierarchy of state water rights. *See Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1379-80 (Colo. 1982) (en banc). However, the determination of those attributes for a federal reserved water right follows a far different logic from that of a state water right. *See id.* at 1379 ("Federal reserved water rights must be understood as a doctrine which places a federal appropriator within the state appropriation scheme by operation of federal law."). Unlike a state water right, the priority of a federal reserved water right is not established by

appropriation for beneficial use; rather, such a right is determined by the withdrawal and reservation of the applicable land for a federal purpose. *See United States v. Jesse,* 744 P.2d 491, 493-94 (Colo. 1987) (en banc). A federal reserved water right, therefore, has a priority date corresponding to the date of the statute, executive order, or treaty creating the reservation, regardless of whether the water at issue has ever been put to actual use. *See id.* at 494. Similarly, the quantity of a federal reserved water right is not determined by the amount of water put to beneficial use; rather, it is determined by the amount of water necessary to carry out the primary purpose of the reservation. *Id.* Further, as is apparent from the fact that the priority date of a federal reserved water right is unconnected to the use of water, such a right cannot be lost by non-use, unlike a water right secured under state law. *Id.*

{17} Thus, as the Colorado Supreme Court observed in *Jesse*:

> In contrast to the doctrine of prior appropriation, which . . . recognizes only the right to divert a quantified amount of water at a specific location for a specific purpose, the federal doctrine of reserved water rights vests the United States with a dormant and indefinite right that may not coincide with water uses sanctioned by state law.

Id. (citations omitted). Such dormant and indefinite rights can be very problematic when it comes to adjudicating and administering water rights in an

arid state, such as New Mexico. Many stream systems in such states are already fully appropriated, and a determination that federal reserved water rights exist often requires "a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *New Mexico,* 438 U.S. at 705. Further, as demonstrated by this case, claims to federal reserved water rights are potentially very large with very early priority dates and can therefore be highly disruptive to rights existing under state law. *See Jesse,* 744 P.2d at 494 ("Because the priority date of the [federal] reserved right relates back to the date of the reservation, reserved water rights threaten existing appropriators with divestment of their rights without compensation."). Accordingly, in recognition of the predominance of state law in the area of water rights and the potentially substantial and detrimental impact on state rights in fully appropriated stream systems, courts must construe the doctrine of federal reserved water rights narrowly. *See id.* Our analysis of the Commissioner's claim to federal reserved water rights in New Mexico's school trust lands therefore follows this principle of narrow construction.

C. Withdrawal and Reservation

{18} "In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the threshold question necessarily is whether the government has in fact withdrawn the land from the public domain and reserved it for a

public purpose." *Sierra Club v. Block,* 622 F. Supp. 842, 853 (D. Colo. 1985). Despite their facial similarities, the terms "withdrawal" and "reservation" have distinct meanings when used in the context of public land law. *Id.* at 854-55. As the Tenth Circuit Court of Appeals recently explained,

> A withdrawal makes land unavailable for certain kinds of private appropriation. . . . It temporarily suspends the operation of some or all of the public land laws, preserving the status quo while Congress or the executive decides on the ultimate disposition of the subject lands.
>
> A reservation, on the other hand, goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular public use.

S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 784 (10th Cir. 2005) (citations omitted). Ultimately, the act of withdrawing and reserving land ensures that it will not be transferred out of federal ownership pursuant to homesteading or other land disposal statutes. *See Winters v. United States,* 143 F. 740, 748 (9th Cir. 1906) ("[W]hen the lands of the government have been legally appropriated or reserved for any purpose, they become severed from the public lands, and . . . no subsequent law or sale should be construed to embrace or operate upon them."); *see also Sierra Club v. Watt,* 659 F.2d 203, 206 (D.C. Cir. 1981) (concluding that a claim for

federal reserved rights failed because "Congress did not withdraw land from the public domain when it passed the [act in question], it merely set forth purposes, goals and authority for the use of the public domain" (internal quotation marks and citation omitted) (footnote omitted)).

{19} The Commissioner essentially asks us to consider the requirements of withdrawal and reservation to be formalistic criteria that are unnecessary for the creation of a federal reservation of land. According to the Commissioner, the "reserved rights doctrine focuses on the purpose of the reservation, not the mechanics." However, this statement presupposes that a federal withdrawal and reservation of land has actually occurred. As we have explained, the question of whether a withdrawal and reservation has occurred necessarily involves mechanics. The Commissioner does not reference any case in which a court has held that federal reserved water rights existed on land that was not previously withdrawn and reserved, and we are aware of no such case.

{20} In the seminal cases in which the United States Supreme Court considered the existence of implied federal reserved water rights – including *New Mexico, Cappaert, Arizona,* and *Winters* – the Court did not focus on the threshold question of whether the relevant congressional acts, executive orders, or treaties withdrew land from the public domain and created a reservation for a federal purpose. In each of those cases, it was undisputed that the federal government had done so. *See, e.g., New Mexico,* 438 U.S. at 707

(national forests); *Cappaert,* 426 U.S. at 140-41 (national monuments); *Arizona,* 373 U.S. at 601 (national recreation areas, national wildlife refuges, and national forests); *Winters,* 207 U.S. at 577 (Indian reservations). Therefore, those cases are only helpful to our analysis as models of what constitutes, as opposed to what does not constitute, a withdrawal and reservation of land for a federal purpose. Our question is whether the legislation on which the Commissioner relies actually created a federal reservation of the school trust lands at issue by withdrawing and reserving them for a particular public use to further a federal purpose.

{21} First, the Commissioner relies on the Organic Act of 1850, which established the boundaries of the Territory of New Mexico and provided for the establishment of a territorial government. Sections 2-5, 9 Stat. at 447-49. In accordance with the federal government's policy of granting public domain land to new "public-land" states in furtherance of supporting public education, *see Andrus,* 446 U.S. at 506, the Organic Act provided as follows:

> [W]hen the lands in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same.

Section 15, 9 Stat. at 452. In making his argument, the Commissioner seizes on the term "reserved" in this provision to support his position that the Act satisfied the threshold requirement of creating a reservation. However, the mere use of the term "reserved" in a congressional act does not necessarily create a federal withdrawal and reservation of land. *See S. Utah Wilderness Alliance,* 425 F.3d at 785 ("[J]ust because a withdrawal uses the term 'reserved' does not mean that it reserves land 'for public uses.'"). As the United States Supreme Court has explained, when Congress granted school trust lands to the Western states, it neither withdrew nor reserved those lands. In fact, "[p]rior to survey, those sections [were] a part of the public lands of the United States and [could have been] disposed of by the Government in any manner and for any purpose consistent with applicable federal statutes." *United States v. Wyoming,* 331 U.S. 440, 443 (1947); *see also United States v. Morrison,* 240 U.S. 192, 198-99, 210 (1916) (concluding that language similar to the Organic Act in the congressional act creating the Territory of Oregon meant that title did not immediately vest in Oregon and that "Congress was at liberty to dispose of the land" until "the sections were defined by survey"); *Dallas v. Swigart,* 24 N.M. 1, 6, 172 P. 416, 417 (1918) ("[T]he reservation from entry under the general land laws shall come into operation only when the [school trust] lands are surveyed in the field, whereupon they are withdrawn from entry."). The Organic Act, like the statute at issue in *Wyoming,* made conveyance of the designated lands subject to

the completion of the official survey, which, as the Commissioner acknowledges, did not occur until many years later. Until completion of the survey, the trust lands remained in the public domain and were subject to disposal by the federal government. Thus, the Organic Act did not contemplate a withdrawal or reservation of the lands that it identified for purposes of now asserting a federal reserved water rights claim. *See S. Utah Wilderness Alliance,* 425 F.3d at 784 (explaining that withdrawal for the purpose of asserting a federal implied water right requires a temporary suspension of "the operation of some or all of the public land laws").

{22} Second, the Commissioner relies on the Ferguson Act of 1898, which was essentially the realization of Congress's promise in the Organic Act to grant the Territory of New Mexico sections sixteen and thirty-six of each township in the Territory. Ferguson Act § 1, 30 Stat. at 484. Of importance in this case, Section 1 of the Ferguson Act, passed roughly fifty years after the Organic Act, indicates that at least some of the lands promised in the Organic Act had either been disposed of by the federal government or officially reserved by the federal government; therefore, the Act promised the Territory of New Mexico indemnity lands to compensate for those lands that were no longer available in sections sixteen and thirty-six. Ferguson Act § 1, 30 Stat. at 484. Section 1 states:

> [S]ections numbered sixteen and thirty-six in every township of the Territory of New Mexico, and where such sections, or any parts

> thereof, are mineral or have been sold or otherwise disposed of by or under the authority of any Act of Congress, other non-mineral lands equivalent thereto . . . in lieu of which the same is taken, are hereby granted to said Territory for the support of common schools, such indemnity lands to be selected within said Territory in such manner as is hereinafter provided: *Provided,* That the sixteenth, and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants of this Act[.]

Id. We infer from this promise of different lands to compensate for Congress's disposal or reservation of lands within the promised sections that Congress was well aware of its ability to reserve lands for a federal purpose, as well as the technical requirements for doing so, and that it chose not to create a federal reservation with respect to New Mexico's school trust lands.

{23} Finally, the Commissioner relies on the Enabling Act of 1910, which ushered the Territory of New Mexico into statehood. Section 1, 36 Stat. at 557-58. Among other things, the Enabling Act recognized that sections sixteen and thirty-six had already been granted to the Territory and additionally granted "sections two and thirty-two in every township . . . for the support of common schools." *Id.* § 6, 36 Stat. at

561. As it did in the Ferguson Act, Congress guaranteed in the Enabling Act indemnity lands to be granted when portions of the newly designated sections were or became unavailable because they

> [were] mineral, or [had] been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or [were] wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field.

Id. Again, the language of the Enabling Act did not sufficiently withdraw or reserve lands to create implied federal reserved water rights; rather, it simply conveyed lands out of federal ownership to the State of New Mexico. Similar to the Ferguson Act, by providing for indemnity lands that were meant to replace lands in the original grant that were, in fact, disposed of or reserved for a federal purpose, the Enabling Act displays Congress's cognizance of the difference between a reservation and a grant. Thus, like the Ferguson Act, we cannot read the Enabling Act to have sufficiently withdrawn and reserved the school trust lands to reach a conclusion that it created a federal reservation in which federal reserved water rights can be inferred.

{24} In summary, none of the congressional acts upon which the Commissioner relies either adequately withdrew the school trust lands from the

public domain or reserved them for a particular public purpose. *See S. Utah Wilderness Alliance,* 425 F.3d at 784. Accordingly, the Commissioner has failed to prove the threshold requirements of demonstrating the existence of implied federal reserved water rights.

D. Federal Purpose

{25} Even if we were to conclude that the congressional acts upon which the Commissioner relies adequately withdrew and reserved the state trust lands at issue in this case, our result would be the same. To establish that an implied federal water right exists in a certain tract of land, one must, in addition to proving that the land was withdrawn and reserved, show that the reservation was for a federal purpose. *See Cappaert,* 426 U.S. at 138. Although we do not deny that the support of common schools is a matter of national interest, we cannot conclude that it is also a federal purpose in the context of the implied federal water rights doctrine. As the term "federal purpose" has been construed in non-Indian federal reserved water rights cases, continuing federal ownership of the reserved lands appears to be a prerequisite to a determination that such rights exist. *See, e.g., New Mexico,* 438 U.S. at 707 & n.14; *Cappaert,* 426 U.S. at 140-42; *Arizona,* 373 U.S. at 601.

{26} The Commissioner argues that the oversight powers retained by the federal government to ensure that the trust is administered properly, along with the federal government's authority to enforce the

trust's terms, represent the equivalent of federal ownership for purposes of establishing implied reserved water rights. Although we agree with the Commissioner that the Enabling Act imposes strict trust obligations on the State, *see* § 10, 36 Stat. at 564-65, we do not agree that such obligations constitute a federal purpose in conjunction with the school trust lands. We reiterate that the federal reserved water rights doctrine must be construed narrowly, and we are aware of no authority that supports the proposition that by retaining oversight or enforcement power over a state's disposition of its trust lands, the federal government also retains the title to the land that is necessary to create a federal reservation and impliedly reserve water rights.

{27} We note that there is one context in which federal reserved water rights are not dependent on continuing federal ownership, namely, Indian reservation lands allotted and conveyed in fee to individual tribal members. *See, e.g., United States v. Powers*, 305 U.S. 527, 532 (1939) ("[W]hen allotments of land were duly made for exclusive use and thereafter conveyed in fee [from the United States government to tribal members], the right to use some portion of tribal waters essential for cultivation passed to the owners."). The Commissioner relies on *Powers* in asserting that federal reserved water rights passed along with the school trust lands when they were conveyed to New Mexico. However, in *Powers*, it was clear and uncontested that the federal government, by treaty, withdrew the land at issue from the public

domain and reserved it for a federal purpose *before* it was allotted and conveyed to individual tribal members. *See id.* at 528, 532-33. Because the federal purpose under which that land was reserved required water to support the tribe's "exclusive right of cultivation," *id.* at 533, the Court concluded that the treaty creating the reservation also impliedly reserved water rights to adequately irrigate the land and refused to rule that those rights were extinguished simply because the land was conveyed in fee to individual landowners. *See id.* On the contrary, as explained above, the lands conveyed to New Mexico in the Organic Act, the Ferguson Act, and the Enabling Act were never withdrawn from the public domain and reserved for a federal purpose. As such, it necessarily follows that any attendant federal reserved water rights that the Commissioner now claims in connection with those lands were also not impliedly reserved. Accordingly, the result reached in *Powers* cannot be reached in this case.

E. Congressional Intent

{28} In addition to arguing that Congress withdrew and reserved the school trust lands for a federal purpose, the Commissioner also contends that the circumstances surrounding Congress's grant of those lands indicates its intent to also grant water rights. Specifically, the Commissioner argues that because Congress was aware of the arid nature of New Mexico's lands when it granted the school trust lands, it must have impliedly intended to reserve water rights

in order to make the lands more valuable. In response, the United States argues in its answer brief that other express acts of Congress aimed at compensating for the aridity of New Mexico's trust lands indicate that no such implied intent existed in the congressional acts upon which the Commissioner relies.

{29} The United States argues that Congress demonstrated its consciousness of the aridity of New Mexico's lands and took action to compensate for it in at least two distinct ways, neither of which involved granting water rights along with the school trust lands. First, the United States Supreme Court has recognized that Congress, in granting school trust lands to New Mexico, made the express decision to grant four sections per township, "instead of the one section per township ordinarily given in the earlier grants," in order to compensate for the fact that the value of the lands that it was granting was comparatively little as a result of the lack of water. *Lassen v. Ariz. ex rel. Ariz. Highway Dep't,* 385 U.S. 458, 463 n.7 (1967). Second, as our Supreme Court recognized in *State ex rel. Interstate Stream Commission v. Reynolds,* 71 N.M. 389, 391, 378 P.2d 622, 623 (1963), the Ferguson Act granted the Territory of New Mexico 500,000 acres of land for the express purpose of establishing permanent water reservoirs for irrigation. Section 6, 30 Stat. at 485. However, we note that Congress did not expressly reference the need for irrigation of the school trust lands in its grant of

those lands in the Ferguson Act. *See id.* § 1, 30 Stat. at 484.

{30} We agree with the United States that both actions of Congress referenced above demonstrate an acknowledgment of the aridity of the school trust lands and that both can be considered measures that were implemented to compensate for the relatively low value of those lands as a result of their aridity. Accordingly, we cannot agree with the Commissioner that we must infer a congressional intent to grant water rights along with the school trust lands in order to guarantee that the arid lands that were granted remained as "productive" as possible.

CONCLUSION

{31} The Commissioner has not established that the various congressional acts promising or conveying trust lands for the support of New Mexican schools withdrew those lands from the public domain and reserved them for a federal purpose – the necessary prerequisites to a finding of congressional implied intent to reserve water rights. Therefore, we affirm the district court's grant of summary judgment.

{32} **IT IS SO ORDERED.**

/s/ James J. Wechsler
JAMES J. WECHSLER, Judge

WE CONCUR:

/s/ Lynn Pickard
LYNN PICKARD, Judge

/s/ Celia Foy Castillo
CELIA FOY CASTILLO, Judge

APPENDIX B

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,
***ex rel.* STATE ENGINEER,**

Plaintiff,

vs.

D-1116-CV-75-184
AF-01-22

UNITED STATES
OF AMERICA, *et al.*,

Defendants.

And

JICARILLA APACHE TRIBE
and the NAVAJO NATION,

Defendant-Intervenors.

DECISION

STATE LAND COMMISSIONER'S MOTION FOR DIRECTED VERDICT STATE'S MOTION FOR SUMMARY JUDGMENT

(Filed Feb. 20, 2007)

Commissioner's Motion for Declaratory Judgment is denied and the State's Motion for Summary Judgment is granted. The Court's reasoning is as follows:

The Declaration of New Mexico Trust Reserved Water Rights (Declaration) was filed August 13, 2004.

The Commissioner's Motion to Dismiss under 1-041 (a), New Mexico Rules of Civil Procedure was filed April 21, 2006, a passage of twenty months, which was denied by the Court. The Court understood that the Declaration was sought to be dismissed by the Commissioner without prejudice with the possibility of being refiled at a later date.

The Commissioner, in his opening brief, argues that because there was no responsive pleading to his Declaration, the Court had no jurisdiction to deny his Motion to Dismiss. However, the Declaration was sufficiently detailed to permit the Court to have considered it a formal claim for water rights under the federal reserved water rights doctrine. The Court treated it as a subfile presented by a party to the law suit. within the framework of the Court's Case Management Plan* and the New Mexico Water Rights Adjudication Statute, NMSA 1978 Section 72-4-17.**

Because of the numbers of anticipated water claimants running into the thousands and nearly fifty lawyers, law firms, water associations and townships in one single stream adjudication law suit it was incumbent upon the Court to supplement the Rules of Civil Procedure for the District Courts by providing tighter supervisory control. The Court's Case Management Plan makes it clear that any and all persons filing a claim for water rights are subject to the jurisdiction of the Court.*

The Commissioner raised in his Declaration a universally imposing threshold issue. Once the issue

was raised and the claim announced, water claimants would not know where they stood with their own water rights until the issue could be decided. Overwhelming public interest, together with possible prejudice to water claimants because of a indeterminate delay in deciding this issue, demanded a timely settlement of this justiciable controversy. *State, ex rel Maloney vs Sierra*, 82 N.M. 125. *Sanchez v. City of Santa Fe*, 82 N.M. 322

A party movant has no absolute right at all times to dismiss his claim but such right is often dependent upon the rights of responding parties and allowing the dismissal is often held to rest with the discretion of the Court. *Dalahoyle vs Lovelace*, 39 N.M. 446. The Court did exercise its discretionary authority in denying the Commissioner's Motion for Leave to Dismiss.

The Motions before the Court center around the interpretation of the Federal Reserved Water Rights Doctrine.

> ". . . . When the United States withdraws its land from the public domain and reserves it for a federal purpose, reserves, by implication, appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. . . . "

Mimbres Valley Irrigation Company vs Salopek, 90 N.M. 410; *Cappaert vs United States*,426 U.S. 128; *United States vs State of New Mexico*, 438 U.S. 696;

Winters vs United States, 207 U.S. 564; *Arizona vs California*, 373 U.S. 546.

The Commissioner argues for relief by way of a Declaratory Judgment pursuant to the Declaratory Judgment Act NMSA 1978 and Rule 1-057 NMRA 2006. According to the Rule movant must be an interested party and there must also be an actual controversy. *State Ex rel Maloney vs Sierra*, 82 N.M. 125, *Sanchez v. City of Santa Fe* 82 N.M. 322

The Commissioner may be an interested party under the Federal Reserved Water Rights Doctrine only if his purpose is congruent with and does not alter the requirements of the federal purpose as designed by Congress. He presents three specific inquiries that the Supreme Court raised in support of his argument. Each of these inquiries refer to land being set aside by Congress for a "specific purpose." He has not shown that the "specific purpose" of which he argues meets the federal purposes outlined in *Mimbres, New Mexico, Arizona* and *Winters*.

For instance, Congress intended the national forests to be put to a variety of uses including stock watering which is not inconsistent with the primary purpose of protecting them. Yet stock watering was not, itself, a direct purpose of reserving the land, *United States v. New Mexico*. Likewise, Congress intended to grant lands to New Mexico for the primary purpose of establishing public schools. The application of water to the land was not, itself, a direct purpose of granting the land.

In addition, Devil's Hole is located on lands owned or controlled by the United States Government. New Mexico school districts are not located on lands owned or controlled by the United States Government. Under *Cappaert*, Congress' express purpose was to protect the desert fish in Devil's Hole. Under *New Mexico*, Congress expressly intended to protect the national forests. In each instance there was respective benefit to the United States. Under the trust land conveyance there is no direct return benefit to the United States. Under *Cappaert* and *New Mexico* the Devil's Hole and National Forests were withdrawn from the public domain but to be regulated later under the control of the United States. Congress granted the trust lands to the State of New Mexico, in fee simple, retaining no ownership interest.

The isolated use of the term "reserved" in the Territorial Organic Act of 1850 cannot be read out of context. The Act which the Commissioner cites in his brief, provides that the property granted to the Territory of New Mexico "shall be, and the same are hereby reserved for the purpose of being applied to schools in said territory". His basic argument is "if the land is arid and the federal purpose entails a use that is water-dependent, then Congressional intent has been inferred." * * * Inference of Congressional intent is lacking because the trust lands could acquire water in the same manner as any other private or public appropriators. *New Mexico*. *Winters* established a strong precedent which is absent in the

Commissioner's syllogism. Congress made no declaration in its legislation that the New Mexico Education System, "without water, would be entirely defeated". *Winters*, *Cappaert* Standing alone, collateral historical documents recognizing the territory of New Mexico as water-deprived are not sufficient for the Court to conclude that the grant was intended as a federal purpose. The doctrine applies to Indian Reservations and other federal enclaves encompassing water rights in nonnavigable streams. *Cappaert*.

The language in the Enabling Act conclusively suggests that New Mexico received the trust lands in fee simple.

Section 8. The schools, colleges and universities, provided for in the Act "shall forever remain under the exclusive control of said state." (NM)

Section 10. "It is hereby declared that all lands hereby granted, including those which, having been heretofore granted, to the said Territory, (NM) are hereby expressly transferred and confirmed to the said State;" (NM) The Section goes on to require the lands to be held in trust. The lands are alienable, by New Mexico, if done in accordance with regulations set out in Section 10. This could not be done if the land were appurtenant to the United States.

New Mexico was granted the trust lands in its own right in trust for the development and support of a school system. *Kelly v. Allen* 49 F.2d 876. This was unsurveyed public domain land. The Commissioner has not shown that the United States retains a fee

interest in the land. No interest remains in the United States Government except prosecuting fiduciary violations of the trust.

The Court concludes, as a matter of law that the Commissioner has not sustained his burden of convincing the Court that

1. Congress intended to withdraw federal lands and reserve it for New Mexico Trust Lands as a federal purpose under the Federal reserve Water Rights Doctrine.

2. That The Commissioner is an interested party under the Federal Reserved Water Rights Doctrine.

3. That Congress intended to reserve, by implication, appurtenant waters to accomplish educational purposes in New Mexico Trust Lands.

Therefore, the Court denies the Commissioner's Motion for Declaratory relief.

The issues before the Court are strictly threshold issues of law. The State argues that summary judgment is appropriate because there is no evidence raising a justiciable doubt that a genuine issue of material fact exists. Rule 1-056 NMRA The Organic Act, referred to above, together with the Ferguson Act, 36 Stat 484 (1898), The New Mexico Enabling Act, 36 Stat 557 (1910) and the Jones Act, 43 Stat 1026 (1927), are each relied upon by both sides. For the reasons given above, these Acts exclude New

Mexico schools as a federal enclave under the federal reserve water rights doctrine.

Therefore, the State is entitled to judgment as a matter of law on the question of Summary Judgment and the Commissioner's Motion for Declaratory Judgment is denied.

Counsel for the State will prepare and circulate a proposed Order within 15 days. The decision is final. The Order, upon filing, may be appealed.

In the instance of appeals I ask counsel to check with the reporter to make sure all documents relied upon are on the record and the record itself is complete.

/s/ Rozier E. Sanchez
ROZIER E. SANCHEZ
District Judge *pro tempore*

***Court's order adopting case management plan, filed September 11, 2003.**

The following Case Management Plan, shall serve as the Court's procedural guide binding all of the parties in the development of all issues arising between the Office of the State Engineer (OSE) and each and every water claimant in the current San Juan River Basin (SYRB) water adjudication law suit.

That all persons and entities, corporate or private, who have filed or will file claims for the use of ground

or surface waters, within SJRB. . . . are deemed or will be deemed, parties to this law suit and are subject, or will be subject, to the terms of this Case Management Plan

72-4-17. **Suits for determination of water rights; parties, hydrographic survey; jurisdiction; unknown claimants.

> In any suit for the determination of a right to use the waters of ny [sic] stream system, all those who claim to the use of such waters are of record and all other [sic], so far as they can be ascertained, with reasonable diligence, shall be made parties.

***Page 17, Commissioner's Response Brief, filed of record January 17, 2007

APPENDIX C

STATE OF NEW MEXICO
ELEVENTH JUDICIAL DISTRICT COURT
SAN JUAN COUNTY

STATE OF NEW MEXICO,
***ex rel.* STATE ENGINEER,**

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants,

THE JICARILLA APACHE TRIBE AND THE NAVAJO NATION,

Defendant-Intervenors.

AF-01-22
LPSJ-CPL-Fed
LaPlata River Section

ORDER AND FINAL JUDGMENT

(Filed Mar. 15, 2007)

THIS MATTER comes before the Court on the following two cross motions filed on July 3, 2007, by the State *ex rel.* State Engineer ("State") and the New Mexico Commissioner of Public Lands ("Commissioner"):

1. State's Motion for Summary Judgment as to Any and All Claims of the New Mexico Commissioner of Public Lands that Arise Under Federal Law; and the

2. Commissioner's Motion for Declaratory Relief.

In its Motion, the State requests the Court to grant a "*final and immediately [appealable] subfile order . . . adjudicating that the Commissioner has no water rights that arise under federal law in the La Plata Section, including no federal reserved water rights.*" The Commissioner's Motion seeks essentially the opposite relief, requesting the Court to "declare that the lands held in the Enabling Act Trust . . . have appurtenant federal reserved water rights."

As used herein, "federal reserved water rights" refers to those water rights that arise under federal law by implication in connection with the federal government's reservation of federal land. *See, e.g., Winters v. United States*, 207 U.S. 564 (1908); *United States v. New Mexico*, 438 U.S. 696, 702 (1978).

The Motions of the State and the Commissioner were filed within a special subproceeding of the San Juan Stream System Adjudication Suit ("San Juan Adjudication"), which the Court assigned a unique court case number (AF-01-22) and which the State assigned a unique subfile number (LPSJ-CPL-Fed). (*See* June 15, 2006, Petition for Commencement of Subfile Proceeding and Request for Issuance of Court Case Number.) The only issue in this subproceeding is the Commissioner's claim for water rights arising under federal law in connection with the state trust lands he holds and manages within the La Plata Section of the San Juan Adjudication.

In accordance with the subfile scheduling order governing this subproceeding, the following parties to the San Juan Adjudication filed motions to intervene in the subproceeding:

1 United States

2 BHP Navajo Coal Company ("BHP")

3 Navajo Nation

4 Jicarilla Apache Nation

5 Bloomfield Irrigation District

6 Gary Horner

7 Cities of Aztec, Bloomfield and Farmington

8 Public Service Company of New Mexico ("PNM")

9 San Juan Water Commission

10 Ute Mountain Ute Tribe

The Court granted the parties' motions to intervene, thus allowing all of them to participate in the subproceeding in accordance with the subfile scheduling order. The United States, BHP, Navajo Nation, Jicarilla Apache Nation, PNM, San Juan Water Commissioner, and the Ute Mountain Ute Tribe all filed briefs in support of the State's Motion for Summary Judgment. None of the intervenors supported the Commissioner's Motion for Declaratory Relief.

NOW, THEREFORE, having considered the cross motions of the State and the Commissioner, the briefs in support and opposition filed by the State, the Commissioner, and the intervenors, as well [sic] the oral augment presented by counsel in open court on February 13, 2007, the Court FINDS, DETERMINES, AND ADJUDICATES:

(1) As to the State's Motion for Summary Judgment, there is no genuine issue as to any material fact and, for the reasons set out in the Court's February 20, 2007 Decision, the State is entitled to a judgment as a matter of law. As a matter of law, no federal reserved water rights are appurtenant to or associated with state trust lands.

THEREFORE, the State's Motion is GRANTED.

(2) As to the Commissioner's Motion for Declaratory Relief, for the foregoing reasons, the Motion is not well taken.

THEREFORE, the Commissioner's Motion is DENIED.

THE COURT FURTHER FINDS, DETERMINES, AND ADJUDICATES that pursuant to NMRA 1-054(B)(1) there is no just reason for delaying a full, complete, and final adjudication and judgment on the Commissioner's claim for federal reserved water rights. Therefore, this ORDER and FINAL JUDGMENT is immediately appealable by the Commissioner, in accordance with the rules of appellate procedure.

IT IS SO ORDERED

/s/ Rozier E. Sanchez Date: 13 March 07
Rozier E. Sanchez
District Judge, *pro tempore*

APPENDIX D

THE SUPREME COURT OF THE STATE OF NEW MEXICO
November 20, 2008

NO. 31,377

STATE OF NEW MEXICO, ex rel., STATE ENGINEER,

Plaintiff-Respondent,

and

UNITED STATES OF AMERICA, JICARILLA APACHE NATION, NAVAJO NATION, UTE MOUNTAIN UTE TRIBE, SAN JUAN WATER COMMISSION and BHP NAVAJO COAL COMPANY,

Defendants-Intervenors-Respondents,

vs.

COMMISSIONER OF PUBLIC LANDS FOR THE STATE OF NEW MEXICO,

Defendant-Petitioner.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeals number 27654.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 20th day of November, 2008.

(SEAL) /s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

APPENDIX E

I. New Mexico Organic Act of 1850, ch. 49, § 15, 9 Stat. 446 (1850)

And be it further enacted, That when the lands in said territory [of New Mexico] shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory, and in the states and territories hereafter to be erected out of the same.

II. Ferguson Act of 1898 ("An Act To make certain grants of land to the Territory of New Mexico and for other purposes"), ch. 489, §§ 1-4, 6-7, and 10, 30 Stat. 484 (1898)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections numbered sixteen and thirty-six in every township of the territory of New Mexico, and where such sections, or any parts thereof, are mineral or have been sold or otherwise disposed of by or under the authority of any act of congress, other non-mineral lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said territory for the support of common schools, such indemnity lands to be selected within said territory in

such manner as is hereinafter provided: *Provided*, That the sixteenth, and thirty-sixth sections embraced in permanent reservations for national purposes shall not at any time be subject to the grants of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants of this act; but such reservations shall be subject to the indemnity provisions of this act.

Sec. 2. That fifty sections of the unappropriated non-mineral lands within said territory, to be selected and located in legal subdivisions as hereinafter provided in this act, shall be, and are hereby, granted to said territory for the purpose of erecting public buildings at the capital of the state of New Mexico when said territory shall become a state and be admitted into the union, when said capital shall be permanently located by the people of New Mexico, for legislative, executive, and judicial purposes.

Sec. 3. That lands to the extent of two townships in quantity, authorized by the sixth section of the act of July twenty-second, eighteen hundred and fifty-four, to be reserved for the establishment of a university in New Mexico, are hereby granted to the territory of New Mexico for university purposes, to be held and used in accordance with the provisions in this section; and any portions of said lands that may not have been heretofore selected by said territory may be selected now by said territory. That in addition to the above, sixty-five thousand acres of non-mineral, unappropriated and unoccupied public land, to be selected and located as hereinafter provided,

together with all saline lands in said territory, are hereby granted to the said territory for the use of said university, and one hundred thousand acres, to be in like manner selected, for the use of an agricultural college. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely invested, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively.

Sec. 4. That five per centum of the proceeds of the sales of public lands lying within said territory which shall be sold by the United States subsequent to the passage of this act, after deducting all expenses incident to the same, shall be paid to the said territory, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said territory.

. . .

Sec. 6. That in lieu of the grant of land for purposes of internal improvement, made to new states by the eighth section of the act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to New Mexico, and in lieu of any claim or demand of the state of New Mexico under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and twenty-nine of the revised statutes, making a grant of swamp and overflowed lands, which grant it is hereby declared is not extended to said state of New Mexico, the following grants of non-mineral, and

unappropriated land are hereby made to said territory for the purposes indicated, namely: For the establishment of permanent water reservoirs for irrigating purposes, five hundred thousand acres; for the improvement of the Rio Grande in New Mexico, and the increasing of the surface flow of the water in the bed of said river, one hundred thousand acres; for the establishment and maintenance of an asylum for the insane, fifty thousand acres; for the establishment and maintenance of a school of mines, fifty thousand acres; for the establishment and maintenance of an asylum for the deaf and dumb, fifty thousand acres; for the establishment and maintenance of a reform school, fifty thousand acres; for the establishment and maintenance of normal schools, one hundred thousand acres; for the establishment and maintenance of an institution for the blind, fifty thousand acres; for a miners' hospital for disabled miners, fifty thousand acres; for the establishment and maintenance of a military institute, fifty thousand acres; for the enlargement and maintenance of the territorial penitentiary, fifty thousand acres. The building known as the Palace, in the city of Santa Fe, and all lands and appurtenances connected therewith and set apart and used therewith, are hereby granted to the territory of New Mexico.

Sec. 7. That this act is intended only as a partial grant of the lands to which said territory may be entitled upon its admission into the union as a state, reserving the question as to the total amount of lands to be granted to said territory until the admission of

said territory as a state shall be determined on by congress.

. . .

Sec. 10. That the lands reserved for university purposes, including all saline lands, and sections sixteen and thirty-six reserved for public schools, may be leased under such laws and regulations as may be hereafter prescribed by the legislative assembly of said territory; but until the meeting of the next legislature of said territory the governor, secretary of the territory, and the solicitor-general shall constitute a board for the leasing of said lands; and all necessary expenses and costs incurred in the leasing, management, and protection of said lands and leases may be paid out of the proceeds derived from such leases. And it shall be unlawful to cut, remove, or appropriate in any way any timber growing upon the lands leased under the provisions of this act, and not more than one section of land shall be leased to any one person, corporation, or association of persons, and no lease shall be made for a longer period than five years, and all leases shall terminate on the admission of said territory as a state; and all money received on account of such leases in excess of actual expenses necessarily incurred in connection with the execution thereof shall be placed to the credit of separate funds for the use of said institutions, and shall be paid out only as directed by the legislative assembly of said territory, and for the purposes indicated herein. The remainder of the lands granted by this act, except those lands which may be leased only as

above provided, may be sold under such laws and regulations as may be hereafter prescribed by the legislative assembly of said territory; and all such necessary costs and expenses as may be incurred in the management, protection, and sale of said lands may be paid out of the proceeds derived from such sales; and not more than one-quarter section of land shall be sold to any one person, corporation, or association of persons, and no sale of said lands or any portion thereof shall be made for less than one dollar and twenty-five cents per acre; and all money received on account of such sales, after deducting the actual expenses necessarily incurred in connection with the execution thereof, shall be placed to the credit of separate funds created for the respective purposes named in this act, and shall be used only as the legislative assembly of said territory may direct, and only for the use of the institutions or purposes for which the respective grants of lands are made: *Provided*, That such legislative assembly may provide for leasing all or any part of the lands granted in this act on the same terms and under the same limitations prescribed above as to the lands that may be leased only, but all leases made under the provisions of this act shall be subject to the approval of the secretary of the interior, and all investments made or securities purchased with the proceeds of sales or leases of lands provided for by this act shall be subject to like approval by the secretary of the interior.

III. New Mexico-Arizona Enabling Act of 1910 ("An act to enable the people of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states; and to enable the people of Arizona to form a constitution and state government and be admitted into the union on an equal footing with the original states."), ch. 310, §§ 6, 7, 10 and 12, 36 Stat. 557 (1910)

Sec. 6. That in addition to sections sixteen and thirty-six, heretofore granted to the territory of New Mexico, sections two and thirty-two in every township in said proposed state not otherwise appropriated at the date of the passage of this act are hereby granted to the said state for the support of common schools; and where sections two, sixteen, thirty-two and thirty-six, or any parts thereof, are mineral, or have been sold, reserved or otherwise appropriated or reserved by or under the authority of any act of congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of Sections Twenty-Two Hundred and Seventy-Five and Twenty-Two Hundred and Seventy-Six of the Revised Statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six,

were mentioned therein: *Provided, however*, that the area of such indemnity selections on account of any fractional township shall not in any event exceed an area which, when added to the area of the above-named sections returned by the survey as in place, will equal four sections for fractional townships containing seventeen thousand two hundred and eighty acres or more, three sections for such townships containing eleven thousand five hundred and twenty acres or more, two sections for such townships containing five thousand seven hundred and sixty acres or more, nor one section for such township containing six hundred and forty acres or more: *And provided further*, That the grants of sections two, sixteen, thirty-two and thirty-six to said state, within national forests now existing or proclaimed, shall not vest the title to said sections in said state until the part of said national forests embracing any of said sections is restored to the public domain; but said granted sections shall be administered as a part of said forests, and at the close of each fiscal year there shall be paid by the secretary of the treasury to the state, as income for its common school fund, such proportion of the gross proceeds of all the national forests within said state as the area of lands hereby granted to said state for school purposes which are situate within said forest reserves, whether surveyed or unsurveyed, and for which no indemnity has been selected, may bear to the total area of all the national forests within said state, the area of said sections when unsurveyed to be determined by the secretary of the interior, by protraction or otherwise, the

amount necessary for such payments being appropriated and made available annually from any money in the treasury not otherwise appropriated.

Sec. 7. In lieu of the grant of land for purposes of internal improvements made to new states by the Eighth Section of the Act of September fourth, eighteen hundred and forty-one, and in lieu of the swamp-land grant made by the Act of September twenty-eighth, eighteen hundred and fifty, and Section Twenty-Four Hundred and Seventy-Nine of the Revised Statutes, and in lieu of the grant of thirty thousand acres for each senator and representative in congress, made by the Act of July second, eighteen hundred and sixty-two, Twelfth Statutes at Large, page five hundred and three, which grants are hereby declared not to extend to the said state, and in lieu of the grant of saline lands heretofore made to the territory of New Mexico for university purposes by Section Three of the Act of June twenty-first, eighteen hundred and ninety-eight, which is hereby repealed, except to the extent of such approved selections of such saline lands as may have been made by said territory prior to the passage of this act, the following grants of lands are hereby made, to wit:

For university purposes, two hundred thousand acres; for legislative, executive and judicial public buildings heretofore erected in said territory or to be hereafter erected in the proposed state, and for the payment of the bonds heretofore or hereafter issued therefor, one hundred thousand acres; for insane

asylums, one hundred thousand acres; for penitentiaries, one hundred thousand acres; for schools and asylums for the deaf, dumb and the blind, one hundred thousand acres; for miners' hospitals for disabled miners, fifty thousand acres; for normal schools, two hundred thousand acres; for state charitable, penal and reformatory institutions, one hundred thousand acres; for agricultural and mechanical colleges, one hundred and fifty thousand acres; and the national appropriation heretofore annually paid for the agricultural and mechanical college to said territory shall, until further order of congress, continue to be paid to said state for the use of said institution; for school of mines, one hundred and fifty thousand acres; for military institutes, one hundred thousand acres; and for the payment of the bonds and accrued interest thereon issued by Grant and Santa Fe counties, New Mexico, which said bonds were validated, approved and confirmed by Act of congress of January sixteenth, eighteen hundred and ninety-seven (Twenty-Ninth Statutes, page four hundred and eighty-seven), one million acres: *Provided*, That if there shall remain any of the one million acres of land so granted, or of the proceeds of the sale or lease thereof, or rents, issues or profits therefrom, after the payment of said debts, such remainder of lands and the proceeds of sales thereof shall be added to and become a part of the permanent school fund of said state, the income therefrom only to be used for the maintenance of the common schools of said state.

. . .

Sec. 10. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust; provided, however, that the state of New Mexico, through proper legislation, may provide for the payment, out of the income from the lands herein granted, which land may be included in a drainage district, of such assessments as have been duly and regularly established against any such lands in properly organized drainage districts under the general drainage laws of said state.

No mortgage or other encumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder

at a public auction to be held at the county seat of a county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said proposed state from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

Lands east of the line between ranges eighteen and nineteen east of the New Mexico principal meridian shall not be sold for less than five dollars per acre, and lands west of said line shall not be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said state, at the request of the secretary of the interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said state, to be selected from lands of the character named and in the manner prescribed in Section Eleven of this Act.

There is hereby reserved to the United States and exempted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water powers or power for hydroelectric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within

the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants, there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section eleven of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys were by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned on the faithful performance of his duties in regard thereto as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any

provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney General of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

. . .

Sec. 12. All grants of lands heretofore made by any act of congress to said territory, except to the extent modified or repealed by this act, are hereby ratified and confirmed to said state, subject to the provisions of this act: provided, however, that nothing in this act contained shall, directly or indirectly, affect any litigation now pending and to which the United States is a party, or any right or claim therein asserted.

. . .

Sec. 18. All saline lands in the proposed state of New Mexico are hereby reserved from entry, location, selection or settlement until such time as congress shall hereafter provide for their disposition.

IV. School Lands Act of 1927 (Jones Act), ch. 57, 44 Stat. 1026 (1927), 43 U.S.C. §§ 870-871 (as amended)

§ 870. Grants of land in aid of common or public schools; extension to those mineral in character; effect of leases

Subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

(a) The grant of numbered mineral sections under this section shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

(b) The additional grant made by this section is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the

same. The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools: Provided, That any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located.

(c) Except as provided in subsection (d) of this section, any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or included in any pending suit or proceeding in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this section.

(d)(1) Notwithstanding subsection (c) of this section, the fact that there is outstanding on any numbered school section, whether or not mineral in character, at the time of its survey a mineral lease or leases entered into by the United States, or an application therefor, shall not prevent the grant of such

numbered school section to the State concerned as provided by this section and section 871 of this title.

(2) Any such numbered school section which has been surveyed prior to July 11, 1956, and which has not been granted to the State concerned solely by reason of the fact that there was outstanding on it at the time of the survey a mineral lease or leases entered into by the United States, or an application therefor, is hereby granted by the United States to such State under this section as if it had not been so leased; and the State shall succeed the position of the United States as lessor under such lease or leases.

(3) Any such numbered school section which is surveyed on or after July 11, 1956, and on which there is outstanding at the time of such survey a mineral lease or leases entered into by the United States, shall (unless excluded from the provisions of this section by subsection (c) of this section for a reason other than the existence of an outstanding lease) be granted to the State concerned immediately upon completion of such survey; and the State shall succeed to the position of the United States as lessor under such lease or leases.

(4) The Secretary of the Interior shall, upon application by a State, issue patents to the State for the lands granted by this section and section 871 of this title, in accordance with section 871a of this title. Such patent shall, if the lease is then outstanding, include a statement that the State succeeded to the

position of the United States as lessor at the time the title vested in the State.

(5) Where at the time rents, royalties, and bonuses accrue the lands or deposits covered by a single lease are owned in part by the State and in part by the United States, the rents, royalties, and bonuses shall be allocated between them in proportion to the acreage in said lease owned by each.

(6) As used in this subsection, "lease" includes "permit" and "lessor" includes "grantor".

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§ 871. Certain grants and laws unaffected

Nothing contained in section 870 of this title is intended or shall be held or construed to increase, diminish, or affect the rights of States under grants other than for the support of common or public schools by numbered school sections in place, and said section shall not apply to indemnity or lieu selections or exchanges or the right after January 25, 1927, to select indemnity for numbered school sections in place lost to the State under the provisions of said section or any Acts, and all existing laws governing such grants and indemnity or lieu selections and exchanges are continued in full force and effect.
